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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

Nos. 136 and 137

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

PLAINTIFF IN ERROR AND APPELLANT,

vs.

R. D. WHITE, AS ADMINISTRATOR OF W. S. WHITE; ELIZABETH WHITE, BY HER NEXT FRIEND, R. D. WHITE; LIZZIE J. WHITE, AND R. D. WHITE,

DEFENDANTS IN ERROR AND APPELLEES.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

FITZGERALD HALL,
Counsel for Plaintiff in Error and Appellant.

FITZHUGH & FITZHUGH,
FRANK ELKINS,
WALTON WHITWELL,
Of Counsel.

November 5, 1927.

(23,428, 23,429)



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

PLAINTIFF IN ERROR AND APPELLANT,

Versus

R. D. WHITE, AS ADMINISTRATOR, ET AL

Defendants in Error and Appellees.

Numbers 135 and 169.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

May It Please the Honorable Court:

On the night of December 21, 1925, W. B. White drove his Ford car on to a grade crossing in the city limits (R., 169) of Memphis, Tennessee, without stopping (R., 97, 313, 316) and a collision occurred with one of the Railway's regular passenger trains. W. B. White, the driver, was killed and the three other occupants of the car were injured. (R., 93, 99, 106.)

Four separate suits were brought against the Railway. (R., 46, 51, 55, 60.) These were consolidated and tried together in the trial court (R., 70, 79), in the Supreme Court of Tennessee (R., 34), and here (R., 416).

In each case each plaintiff relied, among other averments of negligence, upon an old ordinance of the city of Memphis (R., 177, 232) passed January 17, 1880 (R., 232, 235) requiring all railroads in Memphis at every grade crossing to maintain at all times, day and night, a flagman "waving a flag in the day time, and a red lighted lamp at night, to give warning to all of the approaching train . . ."

The validity of this ordinance was specifically challenged by special pleas and by appropriate motions on the ground that in view of better and more economical protection resulting from modern inventions it imposed a direct and useless burden on interstate commerce, was so arbitrary as to lack due process of law, and required the useless waste of the funds of an interstate carrier by railroad. (R., 65-66, 357.)

Verdicts were rendered for the four respective plaintiffs. (R., 387.) The consolidated cases were affirmed on March 31, 1928, by the Supreme Court of Tennessee except that a remittitur was entered in the case of the driver of the car. (R., 43.)

The consolidated cases are here both on writ of error and appeal.* (R., 19, 422.)

The Supreme Court of Tennessee** held, among other things, that said ordinance was valid (R., 37) and that its violation was the proximate cause of the collision giving rise to these four cases. (R., 40.) This constitutional question is the only one presented to this honorable Court.

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*There being some doubt as to the effect of the Act of January 31st, 1928, as amended by the Act of April 26, 1928, it was thought advisable, out of an abundance of precaution, to perfect both a writ of error and appeal. The record in error was filed May 11th, 1928, before the present rules of this honorable Court adopted June 5th, 1928, were promulgated.

**The opinion of the Supreme Court of Tennessee in these cases has not yet been printed in either the Tennessee Reports or the Southwestern Reporter, but is set out in full in the record, pages 34-42.

JURISDICTION.

1.

Final judgments were entered on March 31, 1928. (R., 43.) A writ of error was allowed May 1, 1928. (R., 2, 18-19.) That case was docketed in this court May 11, 1928. An appeal was perfected May 21, 1928. (R., 418, 422.) That case was docketed in this court June 1, 1928. Exactly the same questions are involved in the two cases and by stipulation they are here on the same record. (R., 416, 419.)

The municipal ordinance under attack, enacted January 17, 1880 (Section 670 of Hughey's Digest of Memphis, Tennessee) is as follows:

> "All railroads, whose trains of cars are drawn by steam engines, within the limits of this city, shall provide flagmen for each street such trains may cross; and these flagmen shall be kept constantly on duty at each street when such train crosses, and until the engine has crossed such street, waving a flag in daytime, and a red lighted lamp at night, to give warning to all of the approaching train; and the engineer on each of such trains shall keep the bell constantly ringing while his train is passing through the city, and shall not permit the whistle to be blown while passing through the city; and any and all persons or railroad companies offending against this ordinance shall, upon conviction before the Mayor, be fined not less than $1 nor more than $50 for each and every offense; and a failure to comply therewith, at each and every street crossing, shall be deemed a distinct and separate offense." (R., 177, 232-233.)

Its validity was challenged in all the Tennessee courts and here on the following grounds. Inventive genius has provided through a double audible and visible signal operated by electricity a substitute for the human flagman, which is better, more efficient and more economical. To require, as this ancient obsolete ordinance on its face is held to do, the continuation of the "*human*" flagman when a better and cheaper "*mechanical*" flagman is available—

(a) Violates the due process clause of the Fourteenth Amendment in that it is palpably arbitrary and unreasonable.

(b) Violates the Transportation Act of 1920 which enjoins upon railroad managements efficient and economical operation. See paragraph 3 of Section 15a of the Interstate Commerce Act.

(c) Violates the Commerce Clause (paragraph 3 of section 8 of Article I) of the Constitution of the United States in that it requires a useless waste of funds derived from interstate commerce—thus directly burdening the same—and prevents the best and most effective protection for such commerce.

2.

The judgment sought to be reviewed was a final one by the Supreme Court of Tennessee, which is the court of last resort in that state. The question is as to the constitutionality of a municipal ordinance directly challenged by the proper procedure as violating the federal constitution. The jurisdiction of this honorable Court is claimed under Section 237a of the Judicial Code, as amended by the Act of February 13, 1925. The following cases sustain the right of review by writ of error or appeal under the Act of January 31, 1928, as amended by the Act of April 26, 1928.

Sultan Railway & Timber Company v. *The Department of Labor and Industries of State of Washington*, 48 Supreme Court, 505;
John P. King Mfg. Co. v. *City Council of Augusta*, 48 Supreme Court, 489;
Miller v. *Schoene*, 48 Supreme Court, 246;
Saltonstall v. *Saltonstall*, 48 Supreme Court, 225;
Kansas City Southern Ry. v. *Road Improvement District No. 3*, 266 U. S., 379, 386.

3.

A municipal ordinance is a state statute within the meaning of those words as used in said Section 237 of the Judicial Code as amended.

John P. King Mfg. Co. v. *City Council of Augusta*, 48 Supreme Court, 489;
Zucht v. *King*, 260 U. S., 174, 176.

4.

The Supreme Court of Tennessee expressly overruled the Railway's claim of unconstitutionality and by its opinion and judgment actually enforced against the Railway the municipal ordinance under attack. (R., 37, 40, 43.) The validity of this ordinance is therefore subject to challenge here.

Fiske v. *Kansas*, 274 U. S., 380, 385.

5.

The constitutional question was raised, first, by special pleas (R., 65-67), then by motion at the conclusion of all the testimony (R., 357), then in the motion for a new trial (R., 388-406), then by appropriate assignments of error in the Supreme Court of Tennessee (R., 20-33), and now by proper assignments of error in this Court. (R., 3-18.) This complies in full with the requirements of law as announced in *Mellon* v. *O'Neil*, 48 Supreme Court, 62, and *Whitney* v. *California*, 274 U. S., 357, 360.

6.

To determine whether this ordinance lacked due process of law under the Fourteenth Amendment and was a direct burden upon interstate commerce certain facts were essential to be considered. Most of such testimony was not admitted. (R., 238-241, 261, 272-273, 276-278, 279-280, 288-291.) Where an analysis of the facts is essential to the determination of a question under the federal constitution, their consideration and review by this honorable Court is proper.

First Nat'l Bank of Hartford v. *City of Hartford*, 273 U. S., 548, 552;
Aetna Life Ins. Co. v. *Dunken*, 266 U. S., 389, 394.

7.

As aforesaid, being in doubt as to the effect of the Act of January 31, 1928, as amended by the Act of April 26, 1928, both methods of review were followed in line with the procedure required by Rule 46 of this honorable Court.

Even if both appeal and writ of error should be inappropriate in the case at bar, still it is respectfully submitted that a writ of certiorari is justified by the record and warranted by paragraph (c) of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Roche v. *McDonald*, 48 Supreme Court, 142.

STATEMENT OF THE CASE.

The Pleadings.

Each of the four declarations are alike save for the *ad damnum* provisions. (R., 46-64.) In each the first count was based primarily on three city ordinances, to-wit, a speed ordinance, a parking ordinance and a flagman ordinance. The first two ordinances were abandoned. (R., 178-179, 363-364.) It is averred that the failure to maintain a human flagman was the proximate cause of the collision. (R., 48, 53, 57, 62.) The first were common law counts. (R., 81.)

The second count in each declaration was predicated on the alleged violation of certain Tennessee statutory requirements for the operation of trains. (R., 81.)

In addition to the Railway's plea of the general issue, (R., 64) it set up in its fifth and sixth special pleas (R., 65-66) that modern invention had developed by an electric signal device—a mechanical flagman—a much better, safer and more economical method of crossing protection than that afforded by the human flagman, so that *to obey this ancient ordinance means both less safety and greater cost.* Therefore, it is averred, said ordinance imposes a direct and unnecessary burden on interstate commerce, forbids that efficient and economical operation enjoined by federal law, and is so arbitrary as to deny due process of law.

Plaintiffs did not challenge by demurrer or motion to dismiss the legal efficacy of these special pleas but *joined issue* thereon. (R., 69.)

The Trial.

During the trial the Railway undertook to prove how the "human" flagman and the "mechanical" flagman operated, their respective advantages and disadvantages. The trial judge would permit no comparison between the "human" and "mechanical" flagman and excluded from the record the opinions of experts on this highly technical operating detail. (R., 229-231, 236-240, 259-265, 277-278, 280, 287-289.) Typical

portions of such testimony are set out *in extenso* in the assignment of errors in this Court. (R., 3-18.)

The train which struck the Ford car was engaged in interstate commerce. (R., 355.)

Testimony Admitted.

The city ordinance relied on and enforced against the Railway was passed January 17, 1880. (R., 232, 235.) It requires a "flagman"—nothing is said about "human"—to wave a flag by day and "a red lighted lamp at night . . ." (R., 177.)

The proof shows that *railroads in Memphis and elsewhere* for many years have almost uniformly installed these modern devices instead of having human flagmen. (R., 235, 260, 264, 271, 271-272, 273, 275, 277, 279, 282, 286-289, 345.) Proof not only that the Memphis city authorities acquiesced in such practice but actually encouraged it was excluded. (R., 236, 288-291.)

It is undisputed that this "mechanical" flagman does all that the ordinance requires, to-wit, "waving . . . a red lighted lamp at night . . ." (R., 188, 201, 209, 220, 227.)

Constant progress is being made in the art of railroading. (R., 259-261, 276.) Excellent pictures of this "mechanical" flagman may be found opposite pages 414 and 416 of the record. Its working in connection with the Railway's interlocking plant at the point of the accident is thus described in the record.

> "Q. I will ask you to tell the jury now how this interlocking system out at Poplar Street crossing, and signal system works. Just give them a clear idea of it?
>
> A. This interlocking system out there, and the highway crossing signals—
>
> Q. Interrupting: First, tell us about the interlocking system, and then take up the highway signal?
>
> A. Well, the interlocking itself is composed of what is called an interlocking machine, and each switch signal is connected with a lever to this machine which is operated

by an operator, the power being taken from a storage battery. All switches must assume the position taken by the lever and correspond to it before it can be indicated, and the road lined up. After all the switches and derails are in proper position, the lever in them pulled which operates the signal and that, in turn, allows the passage of the train through the interlocking.

Q. Speak a little more distinctly, Mr. Shubert.

A. Now, the highway crossing signal is controlled through the track; that is, the tracks are bonded together by a bond (fol. 662) wire, copper wire, and the rails are energized by a set of primary batteries. When a train enters within 2,500 feet of the crossing, the trucks of the cars short circuit this current across the rail and that energizes what we call a relay, which in turn, controls this auto-flag, which is both an audible and visible indication to approaching motor cars on the highway. The last operation, after the derail is thrown the lever is pulled upright, the signal to allow the train to proceed over the crossing, as soon as this signal is pulled and the train is in 2,500 feet of the crossing, the bell immediately begins to operate, as well as the flashing of the lights in the auto-flag. Now, that is true of either direction. That is about all there is to the operation.

Q. Now immediately upon the proceed signal being given, which is done by the pulling of a lever, as I understand.

A. Yes.

The Court: Who gets that proceed signal—the engineer?

A. The engineer of the train; yes, sir.

Q. What light does it show, the proceed signal?

A. A green light. Otherwise it is red.

Q. Otherwise it is red?

A. Yes, sir.

Q. Where is the caution signal, if there is one down north of this crossing?

A. Located 2,500 feet north of this home signal. (fol. 663.)

Q. What is that intended for?

A. It is an indication as to what he may expect to find as he approaches the home signal.

Q. If that stands at caution, what is the engineer expected to do?

A. He expects to find a red signal at the home signal.

Q. And that would mean that he must not proceed until what is done?

A. Until the lever is pulled for the board to proceed, or to assume the proceed position.

Q. The light then becomes what?

A. The light starts to flash red.

Q. I mean—

A. The light on the semaphore signal of the home signal is then green.

Q. Turns green. Within what distance can that proceed signal be seen by the engineer, approximately?

A. 1,600 feet.

Q. 1,600 feet. Now, when this proceed signal is given and the engineer comes within 2,500 feet of the crossing, what, if anything, automatically happens?

A. The bell starts to ringing; that is, on the highway crossing signal, or auto-flag, and the lights begin to flash, *being an imitation of a lantern waving back and forth.*

Q. How is that observable to people on the crossing or (fol. 664) approaching on either side?

A. It is impossible to pass it without seeing it. It is an audible as well as visible signal. *It is impossible to pass without observing it—signal lights.* That is, eight in succession; an *imitation of a lantern waving back and forth.*

Q. Now, do the lights go on seconds or minutes apart, or how?

A. Well, they operate about twelve times a second.

Q. All of them?

A. All of them—that is, in sequence, one after another, at the rate of about twelve a second.

Q. Do you mean twelve times—

A. A second.

Q. All of them, twelve flashes a second?

A. Yes.

Q. For each one of them in succession?

A. Yes, sir.

Q. What appearance has that got?

A. *The appearance of a red lantern waving back and forward across the crossings.*

Q. I will ask you the height of that signal post, if you know?

A. *It is 11 foot and eight inches.*" (R., 225-227.)

. . . . . .

"Q. Do those lights flash just on one side or both sides?

A. *On both sides, both approaches to the track.*

Q. Protects both?

A. Yes." (R., 228.)

. . . . . .

"A. These are installed by railroads, due to the fact that they know from past experience, and *I know that they* (fol. 668) *are far superior to crossing watchmen.*

Q. Why?

A. Well, they are on duty all the time, that is, twenty-four hours a day, they have no reason for leaving the crossing, such as a human might. They can indicate to approaching automobiles, long before a crossing watchman could either hear or see an approaching train. Their signal is not confused. That is, a human watchman might get confused between a signal to an approaching automobilist or signal to a train. There is no confusion with

this. It is distinct, and being audible and visible too, it can be heard by a blind man, if it cannot be seen, and railroads recognize that fact." (R., 229-230.)

. . . . . .

"Q. During the entire time that it has been installed there (fol. 681) I will ask you how long, if at all, it has been out of order partially or otherwise?

A. *Approximately 30 minutes, within the last twelve years.*

Q. Thirty minutes in twelve years. Do you know yourself of any better device, means of protecting and safeguarding crossings than this?

Judge Wilson: We object to that, if your Honor please." (R., 238).

Actual experience by the railroad talent of the world demonstrates that this "mechanical" flagman is far superior to the "human" flagman. (R., 229, 260, 261, 264, 274, 277, 282, 286, 288-289, 346-347.)

The "mechanical" flagman is much more economical than the "human" flagman—the difference in the *annual* operating cost of the two kinds of protection in municipal limits alone (excluding all other crossings) on the Railway's lines is over a million dollars a year. (R., 279-282.)

There was no proof to support the ordinance save the ordinance itself.

Testimony Excluded.

Typical portions of the testimony excluded are set out in full in the assignment of errors in this Court. (R., 3-18.) The evolution in crossing protection, the recognition thereof by the municipal authorities of Memphis itself, the informed judgment of the railroad talent of the world was excluded. (R., 236-238, 261, 272-273, 276-280, 288-291.)

The Charge.

The trial judge instructed the jury that this flagman ordinance was valid, that it had been violated by the Railway,

that such violation was negligence as a matter of law, and that their verdict should be for the plaintiffs if they found that such violation was the proximate cause of the collision. (R., 373-374.)

The Verdicts.

These four cases were tried at the same time by the same jury under substantially identical pleadings. The jury in two cases found for the plaintiff on both counts and in two cases for the plaintiff on the first and *for the Railway* on the second counts. (R., 387.)

Opinion of the Supreme Court of Tennessee.

The Supreme Court of Tennessee held that the ordinance was valid, that its violation was the proximate cause of the collision [though it held that the two men on the front seat "were guilty of gross contributory negligence" (R., 41)], that the expert testimony excluded was properly excluded because its admission would have been an invasion of the province of the Court—namely, to determine whether the ordinance was constitutional or unconstitutional. (R., 35.)

SPECIFICATION OF ERRORS.

I.

Section 670* of *Hughey's Digest* of the ordinances of the City of Memphis, passed January 17, 1880, is void because it, as construed by the Tennessee Supreme Court, requires a "human" flagman though the undisputed proof of experts is that the "mechanical" flagman is both more efficacious and more economical. The result is a useless waste of funds earned from interstate commerce to obtain less adequate protection. The ordinance so construed enjoins a direct and unnecessary burden on interstate commerce, is so palpably arbitrary as to deny due process of law and makes impossible that efficient and economical operation required by federal law. (R., 3, 13-17.)

II.

Said city ordinance does not *in terms* require a "human" flagman—it merely requires a flagman to "wave . . . a red lighted lamp at night to give warning to all of the approaching train . . ." The "mechanical" flagman used by the Railway was a legal compliance with the only power the City of Memphis could constitutionally exercise, namely, to require adequate warning of the approach of trains. A municipality may not constitutionally, even in the supposed exercise of its police power, force an interstate common carrier by railroad to take some course other than the safest or to utterly waste its funds. (R., 13-17.)

III.

Testimony that the constituted authorities of Memphis, though informally, now recognize as best the "mechanical" flagman, actually encourage its use, and that the railroad talent

*Counsel for plaintiff below conceded the invalidity of all save the first clause of said ordinance. (R., 233.)

of the world does likewise was both relevant and competent so its exclusion was prejudicial error. The question to be decided by the court was whether the ordinance was constitutional; the question propounded to the witnesses was an entirely different one, to-wit, "What is the best form of crossing protection and why?" To exclude the proof tendered was to recognize as infallible and immutable an ancient legislative declaration, obsolete in point of fact and long ignored in actual practice. (R., 4-12.)

ARGUMENT.

I.

That this ordinance was valid a half century ago—as no doubt it was—is immaterial. *Galveston Electric Company* v. *City of Galveston*, 258 U. S., 388, 400-401. It was adopted under the police power to prevent accidents at grade crossings. Its only requirement is that a flagman shall wave ". . . a red lighted lamp at night . . ." (R., 177.)

This ordinance was passed in 1880 (R., 235). Electrical engineering, as well as railroading, was then in its infancy. A "human" flagman was all then known—a "mechanical" flagman was unknown.

This ordinance directly affects both safety in operation and the expenditure of funds earned in interstate commerce. Its validity therefore is, in the last analysis, for this honorable Court to determine. *Alabama and Vicksburg Ry.* v. *Jackson and Eastern Ry.*, 271 U. S., 244, 250.

The mere fact that it was passed in the exercise of state police power delegated to a municipality is not controlling. Police powers may not be exerted arbitrarily. Intention, howsoever good, does not control. "The actual facts govern." *Sprout* v. *City of South Bend*, 48 Supreme Court, 502, 503.

A state may not, even in the exercise of its police power, directly and seriously burden or unduly discriminate against interstate commerce or act arbitrarily or unreasonably.

Colorado v. *United States*, 271 U. S., 153, 163;
Sanitary District of Chicago v. *U. S.*, 266 U. S., 405, 426;
Missouri v. *Kansas Natural Gas Co.*, 265 U. S., 298, 306;
LaCoste, et al. v. *Louisiana*, 263 U. S., 545, 549;
St. Louis & San Francisco Ry. v. *Public Service Commission*, 254 U. S., 535;
Chicago, Burlington & Quincy R. R. v. *Wisconsin Railroad Commission*, 237 U. S., 220, 226-227.

A state statute or a municipal ordinance may on its face appear perfectly valid but when applied to a given state of facts may become invalid. It is only by a consideration of the facts that the validity of such a statute or ordinance can be determined.

Southern Railway v. *King*, 217 U. S., 524;
Seaboard Air Line v. *Blackwell*, 244 U. S., 310;
City of Acworth v. *Western & Atlantic R. R.*, 159 Ga., 610, 126 S. E., 454, 459.

To determine the federal question here raised a consideration of the facts was essential and therefore proper.

First Nat'l Bank v. *Hartford*, 273 U. S., 548, 552;
Aetna Life Ins. Co. v. *Dunken*, 266 U. S., 389, 394;
Chicago, B. & Q. R. R. v. *Wisconsin*, 237 U. S., 220, 230.

The layman does not understand the technicalities of railroad operation. Inevitably one guesses one way, another a different way. *Hence the views of real experts must control. Southern Pacific* v. *Berkshire*, 254 U. S., 415, 417; *Chesapeake & Ohio* v. *Leitch*, 48 Supreme Court, 336; *Toledo, St. L. & W. R. Co.* v. *Allen*, 48 S. Ct., 215, 217. Yet the trial judge in the case at bar excluded much of the evidence of those in position to know, such testimony being essential to a proper consideration and determination of the constitutional question here involved.

Such a statute as the Georgia "Blow Post" law is not on its face invalid. *Southern Railway* v. *King*, 217 U. S., 524. But when proof of facts show its actual effect it is obviously invalid. *Seaboard Air Line* v. *Blackwell*, 244 U. S., 310. Proof of the facts tendered in the case at bar to support pleas on which issue was joined should have been admitted. *They are as competent here as in said Blackwell case.*

II.

Substantially this identical question was decided favorably to the Railway's contention by the Supreme Court of Georgia in the recent case of *City of Acworth* v. *Western & Atlantic Railroad*, 159 Ga., 610, 126 S. E., 454.

III.

Such cases as *Erie Railroad & Public Utilities Commissioners*, 254 U. S., 394, are irrelevant. There the state in the proper exercise of its police power was remedying a dangerous situation by the *most modern* method of crossing protection—the only point made by the railroad was the enormous cost. In the case at bar the point made by the Railway is that the ordinance as construed by the Tennessee Supreme Court requires the adoption of an *obsolete method of protection* at excessive cost.

IV.

The question here is in very narrow compass. An ordinance to prevent crossing accidents was passed in 1880. The method of protection therein provided was *then* the best known. *Today* that method is entirely obsolete. Electrical inventions have made the "mechanical" flagman far superior to the "human" flagman. (R., 229, 260, 264, 274, 277, 282, 286, 288-289, 346-347.)

Railroads generally, even in Memphis where this old flagman ordinance is still on the books, have resorted to this new, better and more economical method of crossing protection. (R., 235, 260, 264, 271, 271-272, 273, 275, 277, 279, 282, 286-289, 345.)

The Railway offered to show that all the real experts think the "mechanical" flagman far superior to the "human" flagman (R., 229, 260, 264, 274, 277, 282, 286, 288-289, 346-347) and that the City of Memphis, informally to be sure, not only acquiesced but encouraged the use of these electrical devices. (R., 236, 288-291.)

The Railway wanted to put all the facts in the record. The trial judge excluded them on the theory that the question propounded the various witnesses was the question of law he was to decide. (R., 230, 239-240.) Such was not the case. The question of law raised by the Railway was as to the constitutional validity of the flagman ordinance. No witness was asked any such question. They were asked in substance "What is the best form of crossing protection and why?" Their answers—calling for facts alone—obviously were at least competent, even if not controlling, on the question of a technical detail in railroad operation.

There is no proof to support the practice supposedly required by this old ordinance—namely, the use of a "human" flagman. Competent evidence was introduced and offered to show that the "mechanical" flagman provides greater safety at less cost.

The ultimate question then is this—Is an ancient legislative declaration under the police power forever unassailable as long as it is on the statute books? Or again—Is this old flagman ordinance, obsolete in fact and ignored in practice, to be judged by its face alone, or may facts—never dreamed of when it was passed—be put in evidence to demonstrate that obedience thereto requires the waste of funds collected from selling interstate transportation to obtain an out-of-date and comparatively ineffective safety device?

Suppose a municipal ordinance were passed today requiring railroads in the interest of safety to illuminate all grade crossings at night by coal oil lamps. Would anyone seriously urge that the installation of the finest and most modern electric lights would be a violation of that ordinance, or if so, that the ordinance would be valid! Such is the case here.

Railroads are required by law to operate efficiently and economically. Their progress may not be impeded by out-of-date ordinances requiring a form of protection long since discarded as obsolete.

It is respectfully submitted that the Railway had a right to protect the crossing where the collision here involved occurred by the best and most modern device; and that this old ordinance of 1880 cannot be periodically invoked merely to saddle railroads with a charge of negligence for failing to use

obsolete safety devices which the City of Memphis no longer wants. If the legislative branches of municipal governments won't keep pace with the art of railroading, then the courts will unshackle them.

Respectfully submitted,

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
By FITZGERALD HALL,
Counsel.

FITZHUGH & FITZHUGH,
FRANK SLEMONS,
WALTON WHITWELL,
Of Counsel.

November 5, 1928.

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Supreme Court of The United States

OCTOBER TERM, 1928

Numbers 135 and 169

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Plaintiff in Error and Appellant,

Versus

R. D. WHITE, as Administrator of W. B. White;
ELIZABETH WHITE, by her next friend, R. D. White;
LIZZIE J. WHITE, and R. D. WHITE,
Defendants in Error and Appellees.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF R. D. WHITE, ADMINISTRATOR, ET AL., DEFENDANTS IN ERROR AND APPELLEES

JULIAN C. WILSON,
ELIAS GATES,
WALTER P. ARMSTRONG,
Attorneys for Defendants in Error and Appellees.

WM. M. COLMER,
Of Counsel.

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Supreme Court of The United States

OCTOBER TERM, 1928

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Plaintiff in Error and Appellant,

Versus

R. D. WHITE, as Administrator, et al.,
Defendants in Error and Appellees.

Numbers 135 and 169

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF DEFENDANTS IN ERROR AND APPELLEES

May It Please the Honorable Court:

JURISDICTION

This Court has held that the term "statute" as used in Section 237-A of the Judicial Code includes a municipal ordinance so that when the constitutionality of such an ordinance is challenged and sustained by a state court, the action of such court may be reviewed by writ of error.

to give warning to all of the approaching train". (R. 177; 232-233.)

The appliance which the Nashville, Chattanooga & St. Louis Railway had installed consists of a bell and several small (diameter about 4") red lights, fifteen feet high on a pole. This appliance is on the east side (far side as one goes east) of the tracks and on the north side of the highway. (R. 146, 217, 228, 407.) While it is referred to by the railroad company as an "automatic" signal, its operation requires the intervention of a human agency, and it will not operate until a signalman in a tower pulls a lever which gives a south-bound train the home signal, allowing it to enter the block south of Poplar. This signal may be given at any time before the train reaches Poplar and the warning device, if in working order, will begin to work when the train is near or far from Poplar, depending entirely upon whether and when the signalman pulls the lever. (R. 206, 207, 218, 219.)

There is in the record evidence that this device did not operate on the night of the casualty, and that on other occasions it had failed to work properly, even though the signalman in the tower threw the lever. (R. 101, 172, 213.)

It was further shown that when clogged with snow (it was misting snow the night in question) the bell gave out a dull, metallic sound. (R. 98, 214, 219.)

It is not correct to say that the railroads in the City of Memphis uniformly use this appliance. The record shows that at certain other localities in this city, other railroads use human flagmen and crossing gates, and one instance was related where the city had required gates and a human flagman, notwithstanding the presence of a mechanical device similar to the one here involved. One of the defendant's witnesses also stated, in so many words, that crossing

gates are preferable. (R. 216-217; 243-244; 266-268; 270; 275.)

It was further shown that the confusion at the crossing was contributed to by the presence of an advertising sign which flashed red, regardless of whether a train was approaching. (R. 223.)

The railway company was permitted to introduce testimony that this appliance was up to the standard of the art, and its witnesses were allowed to set out, with elaboration, their opinions as to its advantages and to contrast them with their idea of the frailties of human flagmen. They were not permitted to give their opinions upon one of the issues, i. e., that a mechanical device was superior to a human flagman.

The only evidence of expense introduced by the railway company was a comparison of the expense of maintaining a human watchman twenty-four hours a day, at 391 crossings, in municipal limits in four states, without any attempt to show the nature of these crossings, and the cost of maintaining a human flagman at this particular crossing twenty-four hours a day ($3,011.00 per year) as compared with the cost of maintaining this mechanical device ($260.00). There was no attempt to compare the cost of maintaining this mechanical device with that of maintaining a human flagman during the passage of trains as required by the ordinance. (R. 279-282.)

PROPOSITIONS OF LAW

I.

In declining to permit witnesses to testify as to their conclusions as to whether the mechanical appliance was superior to a human flagman, the Supreme Court of Tennessee was merely following its own well established precedents.

Bruce vs. Beall, 99 Tenn. 303.
Cumberland Telephone Co. vs. Peacher Mill Company, 129 Tenn. 374.

These cases are in line with the views of this Court.

Spokane and Inland Empire R. R. Co. vs. U. S. 241 U. S. 344; affirming 210 Fed. 243.

II.

The admissibility of this evidence was for the State Court, for, although a federal question is involved, "proceedings in State Courts must conform to the reasonable requirements of local law. Whether they do is primarily for those courts to determine."

Liberty Warehouse Co. vs. Burley Tobacco Growers Coop. Marketing Assn. 276 U. S. 71 at 88.
People vs. Atwell, 261 U. S. 590.

III.

The witnesses having fully detailed and explained the working of the mechanical appliance, the Court had before it all the facts necessary to enable it to compare the appliance with a human flagman, and the exclusion of the evi-

dence of the witnesses recommending the decision of this question was immaterial, for the deficiencies and efficiencies of a human being are things of which a court will take judicial notice.

Missouri Pacific R. R. vs. Aeby 275 U. S. 426.
Delaware, Lackawanna & Western R. R. Co. vs. The Town of Morristown, et al., 276 U. S. 182.

IV.

When ordinances are enacted under the police power of a state the court will not substitute its judgment for that of the legislative body and these ordinances will be sustained unless clearly arbitrary and unreasonable.

Gorieb vs. Fox, 274 U. S. 603.
Village of Euclid, Ohio, vs. Ambler Realty Co. 272 U. S. 365.
Price vs. Illinois, 238 U. S. 446.
Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.
Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.

Where the question "is fairly debatable" the ordinance will be sustained.

Zahn vs. Board of Public Works of Los Angeles, 274 U. S. ~~325~~ 325, at p. 328.

V.

Where a proper end is to be accomplished and there is a choice as to the means to be selected to accomplish this end, this choice is within the reasonable discretion of the legislature and will not be disturbed unless palpably arbitrary.

Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.

St. Louis, Iron Mountain & Sou. Ry. vs. Arkansas, 240 U. S. 518.
Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.
Denver & Rio Grande vs. Denver, 250 U. S. 241.

VI.

The guarding of grade crossings is so closely related to the protection of safety and health that it falls peculiarly within the police power of the state.

New York and New England R. R. vs. Bristol, 151 U. S. 556.
Railroad Commissioners vs. Southern P. Co. 264 U. S. 331, 341.
Erie R. R. Co. vs. Board of Public Utility Comrs. 254 U. S. 394.
Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

VII.

"A railroad can not escape a duty by pleading the expense of its performance."

Chicago, Burlington & Quincy R. R. vs. Wisconsin, 237 U. S. 220, at 229.
Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.
Denver & Rio Grande R. R. vs. Denver, 250 U. S. 241.
Erie R. R. Co. vs. Board of Public Utility Comrs., 254 U. S. 394.
Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

VIII.

Therefore, whether it be the protection of grade crossings or the prescribing of appliances for use by the carrier, the

legislative body may act under the police power not only to the extent of requiring the end to be accomplished, but of selecting the means by which it is to be accomplished, and its choice will not be disturbed even though it selects a more expensive means, provided it does not act arbitrarily under all the circumstances.

Chicago, Rock Island & Pacific Ry. Co. vs. Arkansas, 219 U. S. 453.

Denver & Rio Grande R. R. Co. vs. Denver, 250 U. S. 241.

Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.

St. Louis, Iron Mountain & Sou. Ry. vs. Arkansas, 240 U. S. 518.

ARGUMENT

Rulings on Evidence

Complaint is made of the action of the Supreme Court of Tennessee in affirming the ruling of the trial judge in declining to permit the railroad company's witnesses to state whether the mechanical appliance or a human flagman was superior. It is not even intimated that in making this ruling the state court acted arbitrarily, departed from its established precedents, endeavored to prevent the presentation of the federal question, or sought to evade its decision. On the contrary, that court squarely met and decided the federal question, and in deciding this question of evidence merely re-affirmed its own rulings that the opinion of a witness, even an expert witness, may not be substituted for that of the court or jury upon any issue being tried. *Bruce vs. Beall*, 99 Tenn. 303; *Cumberland Telephone Company vs. Peacher Mill Company*, 129 Tenn. 374. Opinion of Supreme Court of Tennessee in instant case. (R. 35.)

That the state court was merely applying this rule of evidence without any thought of preventing a proper presentation of the federal question is confirmed by the fact that its views upon this subject are in accord with those of this court. *Spokane and Inland Empire R. R. Co. vs. U. S.*, 241 U. S. 344, affirming 210 Fed. 243.

This ruling upon evidence therefore falls squarely within the rule that, even when a federal question is involved, the proceedings in the state court must conform to the reasonable requirements of the state law. *Liberty Warehouse Co. vs. Burley Tobacco Growers Coop. Marketing Ass'n*, 276 U. S. 71; *People vs. Atwell*, 261 U. S. 590.

Cases cited by opposing counsel that under the Federal

Employers Liability Act employees assumed the risk of dangers with which they must be held to be familiar, such as the position of a mail crane close to the track (*Southern Pacific vs. Berkshire*, 254 U. S. 415; *Chesapeake & Ohio vs. Leitch*, 276 U. S. 429) and the danger of being struck by switching operations when inspecting cars close to a track (*Toledo, St. L. & W. R. Co. vs. Allen*, 276 U. S. 165) do not touch the question.

An examination of the evidence so excluded (R. 229, 260, 264, 277, 282, 286, 288-289, 346-347) discloses that it contains nothing either occult or profound; that it recites no facts; that it discusses nothing peculiarly within the province of expert testimony; that it is merely an attempt to substitute the opinions of these witnesses for those of the court and the city legislative body as to whether, generally speaking, a mechanical appliance is more desirable than a human flagman, and that the witnesses venture this opinion, not in the light of the peculiar situation of this crossing, which is the real question, but as a general hypothetical proposition.

Test of Validity of Ordinances Passed Under Police Power

This leaves only the narrow question as to whether this Court will say that, *as applied to this particular crossing*, the ordinance in question is an improper exercise of the police power.

The increasing prevalence of zoning ordinances has given numerous occasions for the reannouncement of the rules by which ordinances passed under the police power are tested. Such ordinances are "not to be disturbed by the Courts, unless clearly arbitrary and unreasonable." *Gorieb vs. Fox*, 274 U. S. 603, at page 608.

They will be sustained where this question "is fairly debatable." *Zahn vs. Board of Public Works of the City of*

Los Angeles, 274 U. S. 325. See also *Village of Euclid, Ohio, vs. Ambler Realty Company*, 272 U. S. 365 at p. 388.

The Court, in considering these zoning ordinances, has commented on the fact that "State Legislatures and City Councils, dealing with the situation from a practical standpoint, are better qualified than the Courts to determine the necessity, character and degree of regulation which the new and perplexing conditions require," (*Gorieb vs. Fox*, 274 U. S. 603 at 608) and this language would seem to be equally, if not more, applicable to a situation like the one here involved, where the validity of the ordinance depends essentially upon the conditions surrounding this particular crossing.

While in passing upon zoning laws, the Court was dealing with legislation which had entered a new field at a comparatively recent date, it was applying to them the same principles which it had applied before to other laws enacted under the police power, dealing with other situations, and was using in regard to them language practically identic with that which it had used in these other cases. Legislation providing for special assessments against special benefits in road improvement districts had been held to offend the due process clause of the Fourteenth Amendment "only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power." *Kansas City Southern vs. Road Improvement District*, 266 U. S. 379 at page 386.

Pure Food Statutes had been sustained unless palpably unreasonable and arbitrary. *Price vs. Ill.*, 238 U. S. 446.

A requirement for the use of certain specified equipment by interstate carriers is upheld when it "is not arbitrary,—is reasonably related to a proper purpose." *Atl. Coast Line Railroad Company vs. State of Georgia*, 234 U. S. 280, 288 at p. 288.

Protection of Grade Crossing Within Scope of Police Power.

None of these subjects falls more clearly within the zone of the police power than the protection of grade crossings. Indeed, the Court has indicated that so closely is this subject related to health and safety as to be an almost, if not quite unique field for the operation of the police power. It "is one of the most obvious cases of the police power." *Erie vs. Board of Public Utility Commissioners,* 254 U. S. 322. "The care of grade crossings is peculiarly within the police power of the states." *Lehigh Valley Railroad Company vs. Board of Public Utility Commissioners,* 49 Sup. Ct. 69 at p. 72.

Choice of Means Within Legislative Discretion.

This legislative discretion, which will not be disturbed unless it offends against the indicated inhibitions, extends not only to the determination that the end be accomplished, and that therefore means be taken looking to its accomplishment, but to the choice of those means. The requirement of the state legislature, therefore, that trains carry a crew consisting of an engineer, fireman, conductor and three brakemen, will be sustained notwithstanding the contention of the Railroad Company that one of the required brakeman would be a supernumerary in view of the equipment of automatic couplers and air brakes, where the Court can see that the Statute "has a real substantial relation to the object as to which the state is competent to legislate; viz. the personal security of those who are passengers on cars used *within its limits,*" although there may be some doubt as to the efficacy of the regulations and some room for controversy as to whether the statute was necessary.

Such a regulation, if it touches interstate commerce does so only incidentally and remotely. *Chicago, Rock Island and Pac. Railroad Co. vs. State of Arkansas*, 219 U. S. 453, 463.

See also *St. Louis, Iron Mountain & Southern Railroad Co. vs. State of Arkansas*, 240 U. S. 518.

Prior to the passage of the Federal Locomotive Boiler Inspection Act (*Cf. Napier vs. Atlantic Coast Line Railroad Co.*, 272 U. S. 605), it was competent for a state legislature to "require an adequate headlight and whether the carrier's practice is properly conducive to safety or a new method affording greater protection should be substituted, is a matter for legislative judgment." And notwithstanding the introduction by the carrier of evidence as to the alleged superiority of its method, if there is room for differences of opinion, the legislature may choose a specified type of equipment, provided its choice is reasonably related to a proper purpose. This choice is sustained by the rule that the legislature may select the means which it deems to be appropriate to the end to be achieved. *Atlantic Coast Line Railroad Company vs. State of Georgia*, 234 U. S. 280, 288, 289.

A municipality may by ordinance under the police power, without contravening the contract and commerce clauses of the Constitution and due process clause of the 14th Amendment, require the removal of a railroad track from a busy street where it can not be said that its action in so doing for the purposes of safety is plainly unreasonable and arbitrary, notwithstanding a vested right in the railroad to maintain the track and the contention of the carrier that the same result could have been obtained by viaduct, subway, watchmen or flagmen. *Denver and Rio Grande Railroad Company vs. City and County of Denver*, 250 U. S. 241.

Increased Expense Does Not Prevent Reasonable Choice.

This legislative discretion in reasonably selecting means to accomplish a proper end is not negatived by the fact that the means chosen may be more expensive than some other means which might have been selected to accomplish the same purpose.

The additional brakeman, it was insisted by the carrier, required an additional expense, unnecessary in view of the installation of the automatic couplers. *Chicago, Rock Island and Pacific Ry. Co. vs. State of Arkansas,* 219 U. S. 453.

The removal of the track was both more expensive and more inconvenient to the carrier than maintaining a watchman or flagman at the crossing. *Denver & Rio Grande Railroad Co. vs. City and County of Denver,* 250 U. S. 241.

Yet in neither case did the Court deny to the legislative body its discretion of choice because of this additional expense.

That expense does not prevent the proper protection of grade crossings is illustrated by *Erie R. R. Co. vs. Board of Public Utility Commissioners,* 254 U. S. 394, where the Court held that neither prospective bankruptcy nor engagement in interstate commerce could take away the right of the state to require the elimination of such crossings when dangerous.

It is true that in that case the Court was not dealing with alternative methods of eliminating the danger, a subject which recently came before it in the case of *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners,* 49 Sup. Ct. 69. In this case, for the purpose of making a subway more convenient and eliminating certain curves, the New Jersey Board adopted a plan, the increased cost of

which over the one suggested by the railroad company was approximately $100,000.00. The Court refused to disturb the action of the Board, saying:

> "It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant." (49 Sup. Ct. 69, at p. 72).

This case is further applicable because not only the Fourteenth Amendment, but the Transportation Act was invoked by the railroad company. The Court held, however, that "If it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear." (p. 72.)

As we shall point out, the record in the instant case in no sense discloses that the requirement of a human flagman at this crossing would have any effect upon economical management of the railroad, and the present case presents even more than did the situation in *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners, supra,* a "parochial" matter which it was not intended by the Transportation Act to thrust upon the Interstate Commerce Commission.

Application of Authorities to Facts of Record.

It seems not to be insisted that this was not a dangerous crossing of that nature which warranted the requirement of

an effective guard, and, indeed, seems expressly conceded that the very precautions required by the ordinance were proper at the time the ordinance was enacted and would now be proper, save for the insistence that the railroad company has rendered them unnecessary by the substitution of a mechanical appliance. Indeed, when precautions of this kind are required at a crossing, the carrier, if it deems them unnecessary, has the burden of showing that the nature of the crossing is not such as to require them. (*Southern Railway vs. King*, 217 U. S. 524;) and it is only where such affirmative showing is made by the carrier that the requirements will be invalidated (*Seaboard Air Line R. R. Co. vs. Blackwell*, 244 U. S. 310).

The complaint of the carrier in this case, therefore, goes merely, not to the fact that a legislative body has required a guarding of the crossing, but to the means chosen by that body for the guarding, that insistence, as we view it, amounting to a claimed right, in effect, to repeal the ordinance by the substitution of another method of guarding the crossing. Under the authorities to which we have referred, we insist that it cannot be said that the legislative body in choosing the means was guilty of a palpably arbitrary choice, or that the subject today as to whether a human flagman or the mechanical contrivance is preferable is free from reasonable debate.

The mechanism itself not only has the fallibilities incident to a mechanical device, but also those incident to human beings, inasmuch as it will not operate until the leverman in the tower turns the home signal. (R. 206, 207, 218, 219).

It has not been uniformly adopted by railroads, even in the city of Memphis, in some instances the carriers protecting their crossings by gates and still others by human flagmen.

Passing the fact that the device possesses every frailty that a human flagman would possess, because of the necessity of its operation being initiated by a leverman in a tower and the further fact that on occasions it has failed to work properly, it still seems that it may be reasonably and, indeed, successfully contended that a human flagman is not only equal in efficiency, but superior to this contrivance, even when it operates. The mechanism is on a pole fifteen feet high, with small red lights 4" in diameter, and would not be as conspicuous to a motorist partly enveloped in the overhanging hood of an automobile as would a flagman in the center of the highway. The lights which flash *in imitation* (R. 227) of a waving lantern are small as compared with the ordinary railroad lantern. The sound of the bell is dulled by misting snow, and one approaching from the west is not confronted with the signal before one crosses the track, and the constantly flashing advertising sign tends to confuse the traveler. (R. 223).

The stationary nature of the signal as contrasted with the mobility of a human flagman does not give equal facility for adaptability to changing conditions. No matter what the emergency, the slow flash of the small red lights on the signal is not accelerated. The human flagman can wave his large red lantern in a frantic and peremptory signal. No matter what the danger, the mechanism continues the dull monotony of its clanging. The human flagman may gesticulate and shout a challenging warning.

Testimony was not needed to point out the superiority of the human flagman over the mechanical contrivance. If there is any subject of which the Court can take judicial notice it is not only of the frailty, but also the capability of human beings. Regardless of the marvelous mechanical advance which has taken place in the last century, no inventor has yet been able to endow any machine with the

intelligence belonging to the human mind, nor to bring any contrivance to the same degree of perfection that adheres in the human body.

These considerations justify the decision of the debate as to the respective merits of the two methods in favor of the human flagman as an original proposition. Certainly, in the light of them, there is room for debate to such an extent that the legislative body was not guilty of conduct palpably arbitrary in deciding in favor of and continuing to require the guarding of the crossing by a human flagman.

There is an entire absence in this record of any adequate showing of any burdensome expense entailed upon the carrier by observing the precautions required by the ordinance. The cost that would be incident to the observance of the similar requirement at each grade crossing within municipal limits in four states, which was shown in the carrier's evidence, is not material, because this ordinance applies only to the city of Memphis, and if it applied generally the showing made does not represent the situation because it is of the cost of maintaining a flagman twenty-four hours a day at these crossings in four states, whereas the ordinance only requires a flagman when a train crosses.

Confining the inquiry to the City of Memphis, to which this ordinance applies, a mere showing of the number of grade crossings of the carrier within the city does not afford any proper basis for comparison, because it is apparent from the opinion of the Supreme Court of Tennessee in this case that the ordinance would not be sustained except as to a dangerous crossing such as the one here involved, that court reiterating its holding in an unreported case that such ordinance would not be sustained at "an infrequently used crossing". (R. 137.)

In order, therefore, properly to make the comparison, the nature of each grade crossing of this carrier within the

City of Memphis would have to be shown and as to this the record is silent.

The carrier did introduce evidence tending to show the difference in cost in maintaining this mechanical appliance and a flagman *twenty-four hours a day* at this particular crossing. This expense (R. 279-282) was of a much more trifling kind than that which was ignored by the Court in *Chicago, Rock Island and Pacific Railway Co. vs. State of Arkansas,* 219 U. S. 453. Indeed, this showing itself did not fit the facts of the case, because it did not compare the cost of maintaining the signal with the cost of maintaining a flagman while a train was passing, which was the real basis for comparison.

Certainly no clear showing was made that the maintenance of a flagman at this single crossing would have any effect upon the economical management and service of the carrier as was indicated to be necessary in *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners, supra.*

The single case relied upon by the carrier, the facts of which in any wise approach those of the case at bar, (*City of Ackworth vs. Western & Atlantic R. R.,* 159 Ga. 610); declined to take into consideration expense as a determinative element in such cases. That case itself, merely held that the trial court had not abused its discretion in granting a temporary injunction on the facts presented, where the crossing was in a small village instead of a populous city with many tracks passing over a congested highway. The facts themselves do not disclose a situation that would have justified the requirement of any guarding of the crossing.

It is our submission that this ordinance in no wise impedes or checks the flow of interstate commerce, even to the slightest extent; that it, therefore, does not directly

burden it, and, if it concerns it at all, it is only incidentally and remotely to such a slight extent as to be trifling; that, to say the least, it is reasonably debatable whether the mechanism or a human flagman is preferable, and therefore, a matter for undisturbed legislative discretion; that there is no proper showing of any additional cost under a proper construction of the ordinance; that the additional cost, if any, is negligible and not burdensome; that the entire matter is so parochial as not to merit extended consideration.

In view of this, we ask that, if in the opinion of the Court appeal or writ of error is proper, the Supreme Court of Tennessee be affirmed, or, if these methods of review are not proper, that then application for certiorari be denied.

We also ask that damages be imposed as authorized by Rule 30 (2).

Respectfully submitted,

JULIAN C. WILSON,
ELIAS GATES,
WALTER P. ARMSTRONG,
Attorneys for R. D. White as Administrator, et al, Defendants in Error and Appellees.

WM. M. COLMER, of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 135 and 169.—October Term, 1928.

The Nashville, Chattanooga & St. Louis Railway, Plaintiff in Error, 135 *vs.* R. D. White, as Administrator of W. B. White; Elizabeth White, by her next friend, R. D. White; Lizzie J. White, et al.	In Error to and Appeal from the Supreme Court of the State of Tennessee.
Same, Appellant, 169 *vs.* Same.	

[February 18, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

These are actions brought against the plaintiff in error and appellant for causing the death of W. B. White and personal injuries to the other plaintiffs by running down an automobile at a grade crossing in the city of Memphis. The plaintiffs obtained judgments that were affirmed by the Supreme Court of Tennessee. — Tenn. —. W. B. White, who was killed, was driving the car, and his son, R. D. White, one of the plaintiffs, was sitting by his side. The Court states that both knew the Railway not to maintain a flagman and that they were grossly negligent in going upon the track. (*Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66.) The Court held, however, that the proximate cause of the injuries was the Railway's failure to comply with an ordinance of Memphis requiring all railroads on every street crossed by their trains to keep a flagman constantly on duty, to give warning of approaching trains by waving a flag in daytime and a red lighted lamp by night, until the engine had crossed the street. The validity of this ordinance is the only question open before us here.

The Railway had substituted for the flagman an electric signal on one side of the street and about fifteen feet above it that gave warning by flashing a light and ringing a bell and was set in operation mechanically by the train when it came within 2,500 feet of the crossing. The contrivance was testified to be in general use and was said to be cheaper and in some ways at least better than the old precautions. The Railway contended that the ordinance enacted at the beginning of 1880 was valid no longer in view of the modern improvement and that to enforce it now would be to enforce an unnecessary burden on interstate commerce and would be so arbitrary as to amount to a denial of due process of law. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 400. (It may be mentioned that the train concerned was engaged in interstate commerce.) But the crossing in question was said by the Court to be a dangerous one where there was pretty constant travel by night and day, and it was held that as applied to such a crossing it could not be said that the ordinance was so indisputably unnecessary and unreasonable that the legislative judgment could be overruled.

We are compelled to take the same view. The legislative arguments in favor of the Railway are manifest and we may conjecture that it is only a matter of time before the old methods of guarding grade crossings will have disappeared unless the grade crossings precede them. But if the ordinance were passed today and came up for a decision upon its validity, it could not be denied that a man in the middle of the street or near to it and intent on stopping traffic might stop some travellers who might not notice electric signs. There is a marginal chance that occasionally a life may be saved. In this very case it is at least possible that a man on the ground would have stopped the plaintiffs, they not being intent on suicide. No doubt legislatures do neglect such marginal chances. Many modern improvements must be expected to take their toll of life. When a railroad is built experience teaches that it is pretty certain to kill some people before it has lasted long. But a Court cannot condemn a legislature that refuses to allow the toll to be taken even if it thinks that the gain by the change would compensate for any such loss. It follows that we must affirm the judgments below. See *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328.

There were some exceptions to the exclusion of evidence. But if they could be considered in any case they went only to proof that the new device is better than the old. We assume it to be so, but regard that assumption as not controlling the point considered here.

As appeal was the proper mode of bringing the cases to this Court the writs of error may be dismissed.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.